

ORIGINAL

COMMISSIONERS
MIKE GLEASON - Chairman
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
KRISTIN K. MAYES
GARY PIERCE

OPEN MEETING ITEM



0000091431

EXECUTIVE DIRECTOR

ARIZONA CORPORATION COMMISSION

DATE: DECEMBER 2, 2008
DOCKET NOS: T-03632A-04-0603 and T-01051B-04-0603
TO ALL PARTIES:

Enclosed please find the recommendation of Administrative Law Judge Jane Rodda. The recommendation has been filed in the form of an Order on:

COVAD COMMUNICATIONS COMPANY
and QWEST CORPORATION
(COMMERCIAL LINE SHARING AGREEMENT)

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and thirteen (13) copies of the exceptions with the Commission's Docket Control at the address listed below by 4:00 p.m. on or before:

DECEMBER 11, 2008

The enclosed is NOT an order of the Commission, but a recommendation of the Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been scheduled for the Commission's Open Meeting to be held on:

DECEMBER 16, 2008 and DECEMBER 17, 2008

For more information, you may contact Docket Control at (602)542-3477 or the Hearing Division at (602)542-4250. For information about the Open Meeting, contact the Executive Director's Office at (602) 542-3931.

RECEIVED

2008 DEC -2 A 11:17

AZ CORP COMMISSION
DOCKET CONTROL

BRIAN C. McNEIL
EXECUTIVE DIRECTOR

Arizona Corporation Commission
DOCKETED

DEC 11 2008



1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 **COMMISSIONERS**

3 MIKE GLEASON, Chairman
4 WILLIAM A. MUNDELL
5 JEFF HATCH-MILLER
6 KRISTIN K. MAYES
7 GARY PIERCE

8 IN THE MATTER OF THE STAFF'S REQUEST
9 FOR APPROVAL OF COMMERCIAL LINE
10 SHARING AGREEMENT BETWEEN QWEST
11 CORPORATION AND COVAD
12 COMMUNICATIONS COMPANY.

DOCKET NO. T-03632A-04-0603
DOCKET NO. T-01051B-04-0603

DECISION NO. _____

**ORDER DENYING MOTION TO
DISMISS**

11 Open Meeting
12 December 15 & 16, 2008
13 Phoenix, Arizona

14 **BY THE COMMISSION:**

15 * * * * *

16 Having considered the entire record herein and being fully advised in the premises, the Arizona
17 Corporation Commission ("Commission") finds, concludes, and orders that:

18 **FINDINGS OF FACT**

19 1. On May 14, 2004, Qwest Corporation ("Qwest") submitted two agreements to the
20 Arizona Corporation Commission ("Commission"). The first document was entitled "Commercial
21 Line-Sharing Amendment to the Interconnection Agreement" ("Line Sharing Amendment") signed
22 April 14, 2004. This Agreement was filed with the Commission for approval under Section 252 of the
23 Telecommunications Act of 1996 ("1996 Act"). The Line Sharing Amendment sets forth the terms
24 and conditions governing Qwest's provision of line sharing to Dieca Communications Inc. dba Covad
25 Communications Company ("Covad") for orders placed through October 1, 2004, pursuant to the
26 transitional rules created by the FCC's *Triennial Review Order*.¹

27 ¹ In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket
28 No. 01-338, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No.
96098, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket N. 98-147, 18

1 2. Qwest submitted a second agreement with Covad entitled "Terms and Conditions for
2 Commercial Line Sharing Arrangements" ("Arrangements Agreement") also executed April 14, 2004.
3 However, Qwest filed this second agreement with the Commission for informational purposes only.
4 Qwest claims that the Arrangements Agreement is a "commercially negotiated" agreement and argues
5 that it is not required to file it with the Commission for approval under Section 252 of the 1996 Act.
6 Under the Arrangements Agreement, Qwest agreed to provide access to the high frequency portion of
7 its local loops so that Covad may offer advanced data services simultaneously with Qwest's voice
8 band service. The Arrangements Agreement pertains to line sharing orders placed after October 1,
9 2004.

10 3. On August 26, 2004, the Commission's Utility Division ("Staff") filed the
11 Arrangements Agreement with Docket Control and requested that a Docket be opened to review the
12 matter as is normally done when interconnection agreements are submitted to the Commission for
13 approval.

14 4. On September 13, 2004, Qwest filed a Motion to Dismiss Staff's Request for Review of
15 Negotiated Commercial Agreement (With Alternative Request for Intervention). Qwest argues that as
16 a result of the D.C. Circuit's decision in *United State Telecom Association v. FCC* ("USTA II"), for
17 line sharing orders placed after October 1, 2004, Qwest does not have to provide line sharing as a
18 network element under Section 251 or 252 of the 1996 Act. Qwest states that the Arrangements
19 Agreement does not amend or alter the terms and conditions of existing interconnection agreements
20 between Qwest and Covad. Further, Qwest claims that because the Arrangements Agreement does not
21 create any terms or conditions for services that Qwest must provide under Sections 251(b) and (c), it is
22 not an interconnection agreement or an amendment to the existing interconnection agreement between
23 Qwest and Covad.

24 5. On September 21, 2004, Staff filed a Notice that it was seeking comments from
25 interested parties concerning Qwest's and Covad's filing obligations under Section 252 of the 1996
26 Act with respect to the Arrangements Agreement.

27
28 FCC 16978, ¶ 255, *et seq.*, Report and Order and Order on Remand and further Notice of Proposed Rulemaking (2003)
("TRO").

1 6. On October 7, 2004, Covad filed Comments pursuant to Staff's September 21, 2004,
2 Request. Covad stated that it believes that all filing obligations rest with Qwest. Covad acknowledged
3 that Qwest took the position that the Arrangements Agreement does not have to be filed for approval
4 because it does not involve unbundled network elements under Section 251 as a result of the FCC's
5 *TRO*. Covad noted that both Qwest and Covad have publicly disclosed the terms of the Arrangement
6 Agreement and that Qwest has offered these terms to other carriers. Covad stated that it concurred
7 with Qwest's approach. In addition, Covad urged the Commission to stay this Docket until final rules
8 are issued by the FCC. Covad further noted that the FCC issued a NPRM on the filing standard for
9 these types of commercial agreements and incorporated that request into its Order and Notice of
10 Proposed Rulemaking released on August 20, 2004, in *The Matter of Unbundled Access to Network*
11 *Elements and Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange*
12 *Carriers*, WC Docket No. 04-313, CC Docket No., 01-338, para. 13.

13 7. On October 5, 2004, Staff filed an Opposition to Qwest's Motion to Dismiss. Staff
14 stated that Section 252(e) of the 1996 Act requires that "any" Interconnection Agreement be filed with
15 the state commissions. Staff argued that there was no Congressional intent to qualify the Section
16 252(e) filing requirement to mean only those agreements which contain ongoing obligations under
17 Section 251 (b) and (c) as suggested by Qwest. Staff claims that there is no exception to the Section
18 252(e) filing requirement for "commercially negotiated" agreements.

19 8. On October 8, 2004, as supplemental authority, Staff filed the Order of the United
20 States District Court for the Western District of Texas in *Sage Telecom, LP vs. Public Utility*
21 *Commission of Texas*.² In *Sage Telecom*, the District Court required SBC to file the entirety of an
22 agreement containing both products that were and were not governed by Sections 251 or 252 because
23 the agreement was fully integrated.

24 9. On October 15, 2004, Qwest filed its Reply in Support of its Motion to Dismiss. Qwest
25 argues that Staff's interpretation of the filing requirements of Section 252(e) is misplaced as it is
26 directly contradicted by Section 252(e)(2) that specifically establishes that the interconnection
27

28 ² Case No. A-04-CA-364-SS (W.D. Tex. Oct. 7, 2004).

1 agreements are those that are negotiated under Section 252(a). According to Qwest, Section 252(a)
 2 refers specifically to negotiations conducted pursuant to “a request for interconnection services, or
 3 network elements *pursuant to section 251.*” (Emphasis added). Furthermore, Qwest argued, this
 4 interpretation is consistent with the FCC’s *Declaratory Order*,³ in which the FCC concluded that
 5 carriers are only required to file for approval with state commissions those agreements containing
 6 ongoing obligations relating to Section 251(b) or (c). Qwest also argues that Staff does not address the
 7 absence of any delegation to state commissions of approval or decision-making authority over non-251
 8 network elements. Qwest distinguishes its agreement with Covad from the agreement that was the
 9 subject of the decision in *Sage Telecom*, on the grounds that the latter contained terms and conditions
 10 that indisputably related to ongoing obligations under sections 251(b) and (c) in addition to non-
 11 Section 251 terms. In this case, Qwest argues, the Covad Arrangements Agreement does not contain
 12 any terms relating to Section 251.

13 10. By Procedural Orders dated November 18, 2004, and January 3, 2005, the matter was
 14 set for oral argument on January 28, 2005.

15 11. On January 14, 2005, Qwest filed as supplemental authority a copy of a Final Order of
 16 the New Mexico Public Regulation Commission, dated December 23, 2004, *In the Matter of an*
 17 *Agreement Between Qwest Corporation and Covad Entitled “Terms and Conditions for Commercial*
 18 *Line Sharing Arrangements,”* case number 04-00209-UT. The New Mexico Commission found the
 19 line sharing agreement is not an interconnection agreement subject to the filing requirements of
 20 Section 252 because it pertains to network elements that Qwest is not required to unbundle.

21 12. On January 20, 2005, Staff filed as supplemental authority the Final Order and Order
 22 on Reconsideration of the Montana Public Service Commission, in the *Matter of Commercial Line*
 23 *Sharing Agreement for DSL Services Provisioned After October 1, 2004, Between Qwest and DIECA*
 24 *Communications, Inc. d/b/a Covad Communications Company*, Docket No. D2004.6.89. The Montana
 25 Commission found the Qwest/Covad line sharing agreement was a negotiated agreement pursuant to
 26 Sections 251 and 252 of the 1996 Act, and that it required PSC approval prior to implementation.

27 ³ *In the Matter of Qwest Communications International, Inc. Petition for Declaratory Ruling on the Scope of the Duty to*
 28 *File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1),* WC Docket No. 02-89,
 17 FCC Rcd 19337, *Memorandum Opinion and Order* (October 4, 2002).

1 13. On April 19, 2005, Qwest submitted as supplemental authority an *Order of the*
2 *Washington State Utilities and Transportation Commission, In the Matter of the Petition of Multiband*
3 *Communications LLC for Approval of Line Sharing Agreement with Qwest Corporation Pursuant to*
4 *Section 252 of the Telecommunications Act of 1996*, Docket No. UT-053005 (“Washington
5 Decision”). The Washington Commission determined that a line sharing agreement between Qwest
6 and Multiband Communications LLC that contained only an element that is not required to be
7 unbundled is not “an interconnection agreement adopted by negotiation within the meaning of
8 subsection 252(e)(1)”, and thus did not require commission approval.⁴

9 14. On June 14, 2005, Qwest filed as supplemental authority the Order entered by the
10 United States District Court for the District of Montana in *Qwest Corporation v. Montana Public*
11 *Service Commission*, CV-04-053-H-CSO, on June 9, 2005. The Montana District Court concluded
12 Qwest’s line sharing agreement with Covad is not a negotiated interconnection agreement that must be
13 submitted to the PSC for approval under Section 252.

14 15. By Procedural Orders dated June 23, 2006, and August 20, 2006, the Hearing Division
15 ordered interested parties to file any additional supplemental authorities and legal analysis, as well as
16 any procedural recommendations by July 28, 2006, and to file any Reply Briefs/comments by August
17 25, 2006.

18 16. On July 28, 2006, Qwest and Staff filed Supplemental Briefs in response to the June 23,
19 2006 Procedural Order.

20 17. On August 25, 2006, Qwest and Staff filed their Reply Briefs. The same date, Covad
21 filed Comments.

22 18. On September 18, 2006, Qwest filed as supplemental authority *Dieca Communications,*
23 *Inc. v. Florida Public Service Commission*, case No. 4:06 CV LRH/WCS, slip op. (N.D. Fla. Sept. 12,
24 2006), and *Southwestern Bell Telephone, L.P. d/b/a SBC Missouri, v. the Missouri Public Service*
25 *Com’n. et al.*, Case No. 4:05-CV-1264 CAS, slip op. (E.D. Mo. Sept. 14, 2006).

26 19. By Procedural Orders dated September 15, 2006 and September 22, 2006, a Procedural
27

28 ⁴ *Washington Decision* ¶ 26.

1 Conference for the purpose of oral argument was set for October 12, 2006.

2 20. On October 3, 2006, Qwest filed as supplemental authority the *Memorandum Opinion*
3 *and Order of the US District Court, Northern District of Illinois, In Illinois Bell Telephone Co. v Erin*
4 *M. O'Connell-Diaz, et al.*, No. 05C1149, dated September 28, 2006.

5 21. On October 12, 2006, through counsel, Qwest and Staff appeared at a Procedural
6 Conference for oral argument.

7 Qwest's Position

8 22. Qwest argues that there is a link between Section 252 of the 1996 Act that requires
9 interconnection agreements to be filed and Section 251 that establishes the duties that ILECs have with
10 respect to interconnection. According to Qwest, if a network element is not required pursuant to
11 Section 251, any agreement between carriers to provide that element is not an interconnection
12 agreement subject to the filing and approval requirements of Section 252.

13 23. Qwest argued that the line sharing agreement with Covad is not required to be filed for
14 Commission approval because it does not contain any obligations relating to the duties described in
15 Sections 251(b) and (c). Qwest asserts in the *TRO*, the FCC determined that ILECs did not have to
16 unbundle the high frequency portion of the loop ("HFPL").⁵ In addition, Qwest cited a decision of the
17 United States District Court for the District of Montana⁶, in which the court addressed the same line
18 sharing agreement with Covad under consideration in this docket. In that case, the Montana District
19 Court reversed a ruling of the Montana Public Service Commission that required submission of the
20 agreement for approval under Section 252. The Montana District Court found that the Section 252
21 filing requirement is limited to agreements containing ongoing obligations relating to Section 251
22 services. Because line sharing is not a service or element provided pursuant to Section 251, the Court
23 found the agreement with Covad is not the type of agreement contemplated in Section 252(a)(1) that
24 must be filed with the state commission.

25 24. Qwest argues the Arrangements Agreement is not subject to the Section 252 filing
26 requirement not only because it does not contain any ongoing obligations relating to Section 251(b) or

27 ⁵ *TRO* ¶ 155 et seq.

28 ⁶ *Qwest Corporation v. Montana Public Service Commission*, CV-04-053-H-SCO, Order on Qwest's Motion for Judgment
on Appeal (D. Mont., June 9, 2005).

(c) services, but because it does not involve or relate to telecommunications services. Qwest cites the FCC's *Wireline Broadband Order*,⁷ issued on September 23, 2005, in which the FCC found that DSL transmission service bundled with Internet access is no longer a telecommunications service. According to Qwest, in the *Wireline Broadband Order*, the FCC concluded "that wireline broadband Internet access service provided over a provider's own facilities is appropriately classified as an information service because its providers offer a single, integrated service (ie., Internet access) to end users."⁸ Qwest states that the FCC explained further that the classification of wireline broadband Internet access as an information service applies regardless of whether the provider of the service uses its own transmission facilities or those of another carrier.⁹ Qwest asserts that the very purpose of the Arrangements Agreement at issue here is to permit Covad to offer this type of service.

25. Qwest argues that Staff's interpretation of the Section 252 filing obligation is based on the flawed assumption that there are no limits on the agreements that must be filed for review and approval by state commissions. Qwest argues that Section 252(e)(1) is expressly limited to "interconnection agreements" and that the FCC in the *Qwest Declaratory Order* has defined "interconnection agreements" subject to the filing requirements as limited to "only those agreements that contain an ongoing obligation relating to section 251(b) or (c)."¹⁰

26. Qwest further argues that Section 252(e)(6), which provides for judicial review, limits such review to "whether the agreement . . . meets the requirements of section 251 and this section." Qwest argues that if Congress had intended to give state commission authority to review and approve agreements that do not contain the duties listed in Section 251, it would not have limited judicial review in this manner.

27. Qwest argues further that the line sharing agreement with Covad is not a Section 271 element, because while Section 271(c)(2)(B)(iv) requires Bell Operating Companies ("BOC's") to

⁷ *In the Matter of Appropriate Framework for Broadband Access to Internet Order Wireless Facilities, et al*, CC Docket No. 02-33, et al., FCC 05-150, Report and Order and Notice of Proposed Rulemaking (Sept. 25, 2005) ("*Wireline Broadband Order*").

⁸ *Id.* at ¶ 14.

⁹ *Id.* At ¶ 16.

¹⁰ *In the matter of Qwest Corporation Interconnection, Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of negotiated Contractual Arrangements under Section 252(a)(1)*, WC Docket No. 02-89, 17 FCC Rcd 19337, Memorandum Opinion and Order (October 4, 2002) ("*Qwest Declaratory Order*") ¶ 8, n 26.

1 provide "[l]ocal loop transmission" unbundled from other parts of the network, a line sharing
2 arrangement does not provide a CLEC with "loop transmission" since the CLEC only has access to a
3 portion (the non-voice portion) of the loop. Qwest cites the FCC's *Broadband Forbearance Order*,¹¹
4 in which the FCC granted the petitions of Verizon, BellSouth, SBC and Qwest to forbear from
5 enforcing under Section 271 those broadband elements that the FCC relieved from unbundling in the
6 *TRO*.

7 28. Qwest provided the decisions of the New Mexico and Washington commissions which
8 both found the Covad line sharing agreement not to be subject to review and approval under Section
9 252.

10 29. Qwest distinguishes this Commission's Decision requiring review and approval of the
11 Qwest Platform Plus ("QPP") Agreement from the line sharing agreement at issue in this docket.
12 Qwest states that in Decision No. 68116 (September 9, 2005), the Commission determined that the
13 QPP Agreement was integrated with, and non-severable from an amendment to the interconnection
14 agreement. Thus, because the interconnection agreement amendment needed to be filed, so too the
15 QPP Agreement. In the current case, Qwest argues the line sharing agreement is not used in
16 combination with a section 251 service offered under the Qwest/Covad Section 252 interconnection
17 agreement.

18 30. Furthermore, Qwest asserts, in Decision No. 68116 the Commission relied on the
19 conclusion that the switching and shared transport elements that comprise QPP are network elements
20 that BOCs are required to provide under Section 271(c)(2)(B). In contrast, as stated earlier, Qwest
21 asserts the FCC is forbearing from enforcing Section 271 as to the broadband portion of the loop.

22 31. Qwest also argues that the 1996 Act's de-regulatory objections provide a compelling
23 policy basis for not requiring state commission approval of non-251 commercial agreements. Qwest
24 states that the FCC has consistently emphasized the importance of commercial agreements and has
25 specifically "called on industry participants to engage in good faith negotiations to arrive at
26 commercially acceptable arrangements" with respect to network elements that ILECs are no longer

27
28 ¹¹ Petitions for Forbearance of Verizon, SBC, Qwest and BellSouth, W.C. Docket No. 01-338, et seq., Memorandum and
Opinion Order (Rel. Oct 27, 2004) ("Broadband Forbearance Order").

1 required to provide under Section 251(c).¹²

2 32. Qwest states there is no basis for Staff's claim that the Arrangements Agreement must
3 be filed for review to prevent discrimination. Qwest asserts the FCC has authority to protect against
4 discrimination. Sections 201(b) and 202(a) of the 1934 Communications Act prohibit carriers from
5 using "charges" and "classifications" or engaging in "classifications" or engaging in "practices" that
6 are discriminatory, unjust or unreasonable, and Section 208 gives the FCC jurisdiction to enforce these
7 prohibitions. Qwest states that consistent with Section 211(a), it provides its commercial agreements
8 to state commissions on an informational basis and posts the agreements on a website, thereby making
9 them available for public review.

10 Covad's Comments

11 33. In its August 25, 2006 Comments, Covad reiterates and reaffirms its earlier position
12 that it concurs with Qwest's approach of publicly disclosing the terms of the agreement and offering
13 the terms to other carriers. However, Covad asserts that Qwest did not accurately interpret or describe
14 the FCC's *Wireline Broadband Order* or the type of service Covad provides in its Supplemental Brief.
15 Covad also asserts that Qwest's legal conclusion regarding the Arrangements Agreement vis-à-vis
16 Section 252 is not correct and errs in contending that line sharing is not a Section 271 element.
17 Covad, however, did not participate in oral arguments and did not provide legal analysis in support of
18 its comments.

19 Staff's Position

20 34. Staff argues that the Montana District Court decision in *Qwest vs. Montana Public*
21 *Service Commission*, in which the court held that the Covad line sharing agreement did not have to be
22 filed, conflicts with at least two other Federal District Court decisions from Colorado and Utah.¹³
23 According to Staff, the Utah District Court found that Qwest's restrictive construction of Section 252
24 (i.e. that it only covers terms required under Section 251(b) and (c)) is contrary to the plain language
25 and purpose of the Act.¹⁴ Staff asserts its long held position that it is Section 252(e), not Section

26 ¹² Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by
Incumbent Local Exchange Carriers, notice of Proposed Rulemaking, 18 FCC Rcd. 18945 ¶ 7 (FCC rel. Sep 15, 2003)

27 ¹³ *Qwest v Public Service Commission of Utah*, 2005 WL 3534301 (D. Utah 2005) ("Utah QPP Decision"); *Qwest*
Corporation v. Public Utilities Commission of Colorado, 2006 WL 771223 (D/ Colo. 2006) ("Colorado QPP Decision")

28 ¹⁴ *Utah QPP Decision* at 9.

1 252(a)(1) that defines what agreements need to be filed with a state commission.

2 35. Staff argues Section 252(e) is unambiguous that “Any interconnection agreement
3 adopted by negotiation or arbitration shall be submitted for approval to the State commission.”¹⁵ Staff
4 notes that the Utah District Court expressly rejected Qwest’s reasoning that the language of Section
5 252(e) incorporates “an unspoken limitation necessarily required by Section 251 and Section
6 252(a)(1).” Further, Staff asserts the Utah District Court recognized that the FCC has interpreted the
7 language of Section 252(e) broadly and has interpreted the last sentence of 252(a)(1) as being
8 independent of the rest of 252(a)(1)’s language, citing the First Report and Order ¶¶ 165066 and
9 Declaratory Order ¶ 8 (“on its face, section 252(a)(1) does not further limit the types of agreements
10 that carriers must submit to state commissions.”)¹⁶

11 36. According to Staff, the Utah District Court also rejected Qwest’s argument that
12 agreements for network elements not compelled by Section 252(c)(3) of the 1996 Act were
13 “commercial agreements” not “interconnection agreements” subject to the filing requirements:

14
15 Qwest unpersuasively argues that the Commercial Agreement is not an
16 interconnection agreement. Although the Act does not define
17 ‘interconnection agreement,’ the language of the Act suggests that any
18 agreement entered into by competing carriers that implicates issues
19 addressed by the Act is an interconnection agreement. The court does not
20 believe that Congress intended to completely eliminate the statutory filing
21 requirement (which is the first line of defense to avoid discrimination
22 against CLECs) for certain agreements relating to interconnection.
23 Qwest’s restrictive interpretation is contrary to the purpose of the Act
24 because Qwest’s construction of the Act’s language would permit it to
25 circumvent the protective mechanism set up by Congress. *Utah QPP*
26 *Decision* at 7.

27 37. Staff notes too that the Utah District Court found that if Qwest’s position were adopted,
28 vital non-discrimination protections and safeguards contained in the 1996 Act would be
circumvented.

As noted above, the Act provides two mechanisms to prevent
discrimination. First, state-commission approval provides administrative
review to ensure that agreements do not discriminate against other
carriers, and second, the public-filing requirement gives other carriers an
independent opportunity to resist discrimination by having access to the

¹⁵ *Id.* at 6.

¹⁶ *Utah QPP Decision* at 8.

terms and conditions obtained by the favored carrier. Under Qwest's interpretation of the filing requirements, carriers could circumvent these mechanisms. Carriers could simply place some of their agreed-upon terms and conditions in one agreement (to be withheld) and place terms and conditions for Section 251 compelled services or network elements in another agreement (to be filed.) *Utah QPP Decision* at 8.

38. Staff further argues that Qwest's reliance on the FCC's *DSL Wireline Broadband Order* is misplaced. Staff cites the FCC's statements at ¶126:

Several competitive LECs, and one BOC, argue that regardless of how the Commission classified wireline broadband internet access service, including its transmission component, competitive LECs should still be able to purchase UNEs, including UNE loops to provide stand-alone DSL telecommunications service pursuant to section 251(c)(3) of the Act. We agree.

And further:

127. Section 251(c)(3) and the Commission's rules look at what use a competitive LEC will make of a particular network element when obtaining that element pursuant to section 251(c)(3); the use to which the incumbent LEC puts the facility is not dispositive. In this manner, even if an incumbent LEC is only providing an information service over a facility, we look to see whether the requesting carrier intends to provide a telecommunications service over that facility. Thus, competitive LECs will continue to have the same access to UNEs, including DS0s and DS1s, to which they are otherwise entitled under our rules, regardless of the statutory classification of service the incumbent LECs provide over those facilities.

Staff argues that the Arrangement Agreement at issue here is for interconnection and network elements, and the fact that the interconnection and network elements are being provided without regard to Qwest's obligations under Section 251(b) and (c) does not matter.

Analysis and Resolution:

39. We agree with Staff that Qwest's interpretation of its filing obligations under Section 252 as expressed in this docket, is too narrow. The obligation to file an agreement for Commission approval applies to any agreement that "contains an ongoing obligation relating to a facility or equipment used in the provision of telecommunications service."¹⁷

40. Section 252 of the 1996 Act (47 U.S.C. §252) describes how Section 251's obligations are to be implemented and subsection 251(a)(1) provides as follows:

Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier

¹⁷ *Qwest v. Public Utilities Commission of Colorado*, 479 F.3d at 1193.

1 may negotiate and enter into a binding agreement with the requesting
2 telecommunications carrier or carriers without regard to the standards set
3 forth in subsection (b) and (c) of section 251. The agreement shall include
4 a detailed schedule of itemized charges for interconnection and each
service or network element included in the agreement. The agreement,
including any interconnection agreement negotiated before the date of the
enactment of the Telecommunications Act of 1996, shall be submitted to
the State commission under subsection (e) of this section.

5 Section 252(e)(1) provides:

6 Any interconnection agreement adopted by negotiation or arbitration shall
7 be submitted for approval to the State commission. A State commission to
8 which an agreement is submitted shall approve or reject the agreement,
with written findings as to any deficiencies.

9 41. Section 252(e)(1) is an independent provision and the filing requirement applies to any
10 interconnection agreement.

11 42. As promoted by Staff in this proceeding, the obligation to file an interconnection
12 agreement is not dependent on whether the network elements are required to be unbundled pursuant to
13 Section 251(b) or (c). When it upheld the Utah and Colorado District Courts affirmations of the Utah
14 and Colorado Commissions, the Tenth Circuit Court of Appeals agreed with this interpretation.

15 43. The Tenth Circuit Court of Appeals considered Qwest's obligations to file its QPP
16 Master Agreement in *Qwest v the Public Utilities Commission of the State of Colorado*, 479 F.3d
17 1184, (C.A. 10 March 5, 2007) ("*Colorado/Utah QPP Appeal*"). The agreement in question arose
18 from the QPP Agreement that Qwest filed in Colorado and Utah. The Public Utility Commission of
19 Colorado and the Public Utility Service Commission of Utah had both independently determined that
20 Qwest was required pursuant to the Section 252(a) to submit to the state commissions its QPP
21 Agreement with MCImetro for approval. The district courts in Colorado and Utah agreed. The circuit
22 court affirmed.

23 44. In the Tenth Circuit case, Qwest had relied in part on a Montana District Court case
24 which had found that in connection with a line sharing agreement, indeed the same line sharing
25 agreement as is the subject of this docket, which the line sharing agreement was not subject to filing
26 under Section 252. The Montana Court interpreted "pursuant to section 251" to limit the filing
27 obligation to "those agreements that contain section 251 obligations." (*Qwest Corp. v. Schnieder*, No.
28 CV-04-053-H-CSO, 2005 U.S. Dist. LEXIS 17110 at * 21 (D. Mont. June 5, 2005). The Tenth

1 Circuit stated that the holding in *Schneider* that agreements containing an “ongoing obligation relating
2 to section 251(b) or (c)” are “those agreements that contain section 251 obligations” is untenable. The
3 Tenth Circuit found the limit on the filing agreement arises from the word “relating” rather than the
4 term “pursuant to.” In the *Colorado/Utah QPP Appeal*, the Tenth Circuit found that the QPP
5 agreement related to interconnection because even though switching and shared transport were no
6 longer required to be provided on an unbundled basis pursuant to the *TRRO*, switching and shared
7 transport are related to the physical connection of two networks. Thus, the QPP agreement was an
8 interconnection agreement for the provision of telecommunication service and should be filed for state
9 commission review.

10 45. Line sharing and the QPP product are distinguishable. The FCC has determined that
11 wireline broadband Internet access services and those wireline broadband technologies that have been
12 utilized for such Internet access services are “information services” rather than “telecommunications
13 service.”¹⁸ Further, the FCC has decided that the appropriate framework for wireline broadband
14 Internet access service is eligible for a lighter regulatory touch.¹⁹ As such, the FCC found that
15 facilities-based wireline broadband Internet access service providers are no longer required to separate
16 out and offer the wireline broadband transmission component of wireline broadband Internet access
17 services as a stand-alone telecommunications service.²⁰ Further, the Arrangements Agreement is a
18 stand alone agreement, and not an amendment to an interconnection agreement.

19 46. In the *Wireline Broadband Order* the FCC concluded that “wireline broadband Internet
20 access service provided over a provider’s own facilities is appropriately classified as an information
21 service because its providers offer a single, integrated service (i.e. Internet access) to end users.”
22 *Wireline Broadband Order* at ¶14. Further the FCC found that broadband Internet service is an
23 information service when the provider of the retail service does not provide the service over its own
24 transmission facilities.” *Id.* at ¶ 16.

25 47. In the *Wireline Broadband Order* the FCC did not determine the filing requirements of
26 Section 252, but rather that ILECs were not required to unbundle broadband Internet access services.

27 ¹⁸ *Wireline Broadband Order* ¶¶ 11-17.

28 ¹⁹ *Id.* ¶ 3.

²⁰ *Id.* ¶ 5.

1 48. We believe that whether the specific line sharing agreement before us now is subject to
2 the filing requirements of Section 252 depends on whether the service is for the provision of
3 "information services" or "telecommunications services." As the FCC states in para. 127 of the
4 Wireline Broadband Order, the appropriate inquiry is on what use the competitive LEC will make of
5 the particular network element.

6 49. If the Arrangements Agreement is for the purpose of Covad providing "information
7 services" as the FCC has defined that term, we agree with Qwest that it is not an interconnection
8 agreement for the provision of telecommunications services subject to the filing requirements of
9 Section 252(e) of the 1996 Act.

10 50. Qwest has stated that Covad utilizes the HFPL for the purpose of bundling DSL
11 transmission service with Internet access.

12 51. Covad, however, has stated that Qwest has not accurately described "the type of service
13 Covad provides under the Agreements nor is Qwest's legal conclusion regarding the Agreements vis-
14 à-vis section 252 of the Telecommunications Act correct. Qwest's contention that line sharing is not a
15 271 element is wrong. Moreover, Qwest has not correctly interpreted the FCC's Broadband
16 Forbearance Order. The Commission therefore should not rely upon any of Qwest's contentions
17 above to support any rulings or orders in this docket."

18 52. The Arrangement Agreement states that it provides Covad with "the opportunity to
19 offer advanced data services." Such terminology suggests Covad is using the high frequency portion
20 of the loop to provide "information services", but it is not dispositive. We cannot tell from the
21 language of the agreement alone whether the service is for information services alone or could
22 encompass "telecommunication services." Covad's cryptic comments do not clarify whether HFPL is
23 being used solely for the provision of "information services." Covad did not provide any legal
24 analysis in this proceeding, and we do not rely on its legal conclusions. We do believe, however, that
25 Covad may possess important facts that would allow us to make the proper determination of the
26 applicability of Section 252(e)(1). Consequently, we direct Qwest and Covad to provide additional
27 information that would allow us to determine our obligation to review the subject agreement. Upon
28 receipt of the information, and any additional proceedings that may be required to make a

1 determination, the Hearing Division shall bring the matter before us for the final determination
2 whether the Arrangements Agreement is for the purpose of providing "information services."

3 **CONCLUSIONS OF LAW**

4 1. Qwest is a public service corporation within the meaning of Article XV of the Arizona
5 Constitution.

6 2. Qwest is an ILEC within the meaning of 47 U.S.C. § 252.

7 3. Covad is a competitive local exchange carrier.

8 4. The Commission has jurisdiction over Covad and Qwest and of the subject matter of
9 this proceeding pursuant to A.R.S. §§ 40-202 et seq., A.A.C. R14-2-106 and 47 U.S.C. §252(e).

10 5. We cannot determine as a matter of law whether the Arrangements Agreement
11 involves the provision of telecommunications service.

12 6. The Commission shall retain jurisdiction over this matter pending a final
13 determination of the applicability of Section 252(e)(1).

14 ...

15 ...

16 ...

17 ...

18 ...

19 ...

20 ...

21 ...

22 ...

23 ...

24 ...

25 ...

26 ...

27 ...

28 ...

ORDER

IT IS THEREFORE ORDERED that Qwest Corporation's Motion to Dismiss is denied.

IT IS FURTHER ORDERED that Qwest Corporation and Dieca Communications Inc. dba Covad Communications Company shall be deemed parties to this case and shall file within 60 days of the effective date of this Order, additional information concerning the Arrangements Agreement to allow a determination of whether the high frequency portion of the loop is being used solely to provide information services, as well as an update of any controlling legal authority.

IT IS FURTHER ORDERED that the Hearing Division shall conduct further proceedings consistent with this Order.

IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

CHAIRMAN

COMMISSIONER

COMMISSIONER

COMMISSIONER

COMMISSIONER

IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive Director of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this ____ day of _____, 2008.

BRIAN C. McNEIL
EXECUTIVE DIRECTOR

DISSENT _____

DISSENT _____

1
2 SERVICE LIST FOR:

LEVEL 3 COMMUNICATIONS LLC/ QWEST
CORPORATION

3 DOCKET NOS.:

T-03654A-05-0350 and T-01051B-05-0350

4 Michael W. Patten
5 Roshka DeWulf & Patten, PLC
6 One Arizona Center
7 400 E. Van Buren Street
8 Suite 800
9 Phoenix, Arizona 85004

10 Richard E. Thayer
11 Erik Cecil
12 Level 3 Communications, LLC
13 1015 Eldorado Boulevard
14 Broomfield, CO 80021

15 Henry T. Kelly
16 Joseph E. Donovan
17 Scott A. Kassman
18 Kelley, Drye & Warren LLP
19 333 West Wacker Drive
20 Chicago, IL 60606

21 Christopher W. Savage
22 Cole, Raywid & Braverman, LLP
23 1919 Pennsylvania Ave., NW
24 Washington, DC 20006

25 Norman G. Curtright
26 QWEST CORPORATION
27 4041 N. Central Ave., 11th Floor
28 Phoenix, AZ 85012

19 Thomas M. Dethlefs
20 Senior Attorney
21 Qwest Legal Dept/CD&S
22 1801 California St., Suite 900
23 Denver, Colorado 80202

24 Janice Alward, Chief Counsel
25 Legal Division
26 ARIZONA CORPORATION COMMISSION
27 1200 West Washington Street
28 Phoenix, Arizona 85007

25 Ernest Johnson, Director
26 Utilities Division
27 ARIZONA CORPORATION COMMISSION
28 1200 West Washington Street
Phoenix, Arizona 85007